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Supreme Court of the United States

October Term, 1967.

No. 1223

PAUL E. PERRY,
Respondent,

versus

BALTIMORE CONTRACTORS, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Petitioners.

Petition for Writ of Certiorari to the Court of Appeal, First Circuit, State of Louisiana.

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MAY IT PLEASE THE COURT:

Baltimore Contractors, Inc. and New Amsterdam Casualty Company, petitioners, pray that a writ of certiorari issue to the Court of Appeal, First Circuit, State of Louisiana.

OPINIONS BELOW.

The opinion of the 17th Judicial District Court, Parish of Terrebonne, State of Louisiana[1] is unreported. The original opinion[2] and the opinion on rehearing

[1] Cf. Appendix A.
[2] Cf. Appendix B.

of the Court of Appeal, First Circuit, State of Louisiana[3] are reported at 202 So. 2d 694. The denial of petitioners' application for certiorari or review by the Supreme Court of Louisiana is reported at 204 So. 2d 579.[4]

STATEMENT OF JURISDICTION.

The judgment of the Court of Appeal, First Circuit, State of Louisiana, sought to be reviewed here was rendered on June 30, 1967. The Court of Appeal, First Circuit, State of Louisiana denied a rehearing on October 4, 1967. The Supreme Court of Louisiana declined to review the case on December 13, 1967.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257(3).

QUESTIONS PRESENTED.

1. Does the Longshoremen's & Harbor Workers' Compensation Act apply to an accident occurring in a cofferdam?

2. If the Longshoremen's & Harbor Workers' Compensation Act is applicable, is a general contractor, who is liable for compensation because of the failure of a subcontractor to secure the payment of compensation, immune from tort liability to an employee of the subcontractor?

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[3] Cf. Appendix C.
[4] Cf. Appendix D.

3. Assuming, arguendo, that maritime law is applicable, did the court err in failing to award petitioners recovery over against the subcontractor under the principles of maritime indemnity?

STATUTES INVOLVED.

1. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., and particularly §§ 904 & 905.[5]

2. The Louisiana Workmen's Compensation Act, L.R.S. 23:1021 et seq., and particularly L.R.S. 23:1061.[6]

3. The Extension of Admiralty Jurisdiction Act, 46 U.S.C.A. §740.[7]

STATEMENT OF THE CASE.

Paul Perry, respondent here, while employed as a diver by Underwater Exploration Co., Inc., (of which Perry was president) third party defendant, and respondent, was injured on October 13, 1958 while working in a cofferdam adjacent to the Intracoastal Canal at Houma, Louisiana. While he was on the bottom of the cofferdam, he was raised out of the water by a crane owned by petitioner Baltimore Contractors, Inc., then lowered to a few feet above the water and released.

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[5] Cf. Appendix E.
[6] Cf. Appendix F.
[7] Cf. Appendix G.

The cofferdam was a rectangle constructed of sheet piling effectively to seal off the waters of the canal so that the floors and walls of a tunnel under the canal could be constructed.[8] The cofferdam was divided into bays which were rectangular areas between 12 and 15 feet in width and from 30-40 feet in length.[9] A diver, such as Perry, could move from one bay to another without surfacing.[10]

On the day in question, Perry had gone down into bay #6 of the cofferdam.[11] While underwater, he crossed over to bay #4 where the crane was digging.[12] Perry's line tender, Picou, an employee of Underwater, and the only man who knew where Perry was while he was underwater,[13] permitted Perry to walk on the mud floor of the cofferdam into Bay #4[14] although he knew, or certainly should have known, that the crane, which was some twenty feet from Picou,[15] was operating in bay # 4.

Petitioners' very first pleading in this action was an exception of no cause or right of action predicated upon their contention that the Louisiana Workmen's Compensation Act was respondent's sole remedy.[16] Subsequent to the filing of this exception, respondent amended his petition and claimed every imaginable

[8] R. 98, 108, 137.
[9] R. 133.
[10] R. 131.
[11] R. 133.
[12] R. 133-134.
[13] R. 160.
[14] R. 163.
[15] R. 160.
[16] R. 10.

remedy from the Jones Act to State Workmen's Compensation.[17] Petitioners later filed answer,[18] and then, sought indemnity from Underwater Exploration Co., Inc. by way of third party petition.[19] When the trial court held that the Longshoremen's Act was applicable, and that petitioners were liable in tort under that Act,[20] petitioners then argued alternatively that if the Longshoremen's Act was applicable, it provided respondent's exclusive remedy.[21]

The trial court found that the Longshoremen's Act was applicable and that petitioners were liable in tort under the Longshoremen's Act.[22] The trial court, in its judgment, did not mention petitioners' claim for indemnity.[23] The Court of Appeal affirmed and also denied petitioners' claim for indemnity.[24] After the Court of Appeal denied a rehearing,[25] the Louisiana Supreme Court denied petitioners' application for writs of review.[26]

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[17] R. 17, 38.
[18] R. 24, 28, 44.
[19] R. 50.
[20] R. 233, 239, Cf. Appendix A.
[21] Cf. Petitioners Brief in Court of Appeal, First Circuit.
[22] Footnote 20, *supra*.
[23] *Ibid.*
[24] Cf. Appendix B.
[25] Cf. Appendix C.
[26] Cf. Appendix D.

ARGUMENT.

Point I. The Louisiana Workmen's Compensation Act is Respondent's Sole and Exclusive Remedy, and Petitioners' Only Liability.

Since respondent Perry's injuries occurred while he was walking on the floor of a cofferdam, completely removed from navigable waters, his sole remedy is provided by the laws of Louisiana, and particularly the Louisiana Workmen's Compensation Act.

It is clear, as both the trial court and the Court of Appeal found, that the injury occurred while respondent Perry was walking on the floor of a cofferdam, an area which had been completely removed from all possibility of navigation. Such areas have consistently been held to be non-navigable, and thus subject to the laws of the state in which they may be located,[27] in this case, the State of Louisiana.

It is likewise clear that under Louisiana law, respondent Perry was the "statutory employee" of petitioner Baltimore.[28] Under the Workmen's Compensation Act of Louisiana, respondent Underwater as subcontractor, operating under Baltimore's supervision,[29] undertook to do part of petitioner Balti-

[27] *Jeffers v. Foundation Co.*, 85 F.2d 24 (2 Cir. 1936); *Millers' Ind. Underwriters v. Braud*, 270 U.S. 59; *Massman Construction Co. v. Bassett*, 30 F.Supp. 813 (D.C.E.D.Mo., 1940), reversed on other grounds, 120 F.2d 230 (8 Cir. 1941); *Central Engineering Co. v. Bassett*, 42 F.Supp. 750 (D.C.S.D.Ill., 1941).

[28] L.R.S. 23:1061, cf. Appendix F.

[29] R. 106, 107.

more's "trade, business or occupation", i.e. the diving operations, in connection with Baltimore's contract to construct a tunnel under the Intracoastal Canal at Houma, Louisiana. The diving operation was a necessary part of Baltimore's operations, since the diver by means of his jet hose could loosen mud from the sides of the cofferdam and could perform other functions which assisted in the digging operations.[30]

It is well settled law in Louisiana that the Compensation Act is the exclusive remedy of a statutory employee against his statutory employer.[31] The statutory employer is specifically made immune from tort liability to the statutory employee.[32]

Before the passage of the Extension of Admiralty Jurisdiction Act,[33] respondent Perry's sole recovery would unquestionably have been under the Louisiana Workmen's Compensation Act, since his accident did not occur on navigable waters.[34] It is further submitted that the Extension of Admiralty Jurisdiction Act did not create any new legal rights, but, as the Ninth Circuit expressed it when upholding the constitutionality of that Act, "the Admiralty Extension Act merely made a new remedy available for an already existing cause of action."[35] The only cause of

[30] Perry's deposition, D 4 at pp. 2, 6.
[31] *Thibodeaux v. Sun Oil Co.*, 218 La. 453, 49 So.2d 852 (1950); *Meche v. Farmers Drier & Storage Co.*, 193 So.2d 807 (La. App. 1967), *writ ref.*, 250 La. 369, 195 So.2d 644 (1967).
[32] *Ibid.*
[33] 46 U.S.C.A. §740, Cf. Appendix G.
[34] *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179.
[35] *U. S. v. Matson Navigation Co.*, 201 F.2d 610, 617 (9 Cir. 1953).

action which respondent has is that under the Louisiana Workmen's Compensation Act. The Extension of Admiralty Jurisdiction Act, *supra*, gives him no additional substantive rights.

In *American Export Lines, Inc. v. Revel*,[36] plaintiff was injured on a dock when, because of a defective ship's winch, cargo fell and hit him. After a thorough consideration of the law, the court concluded that the plaintiff's remedies were solely under local law, citing *Swanson v. Marra Bros.*,[37] and *State Industrial Commission v. Nordenholdt Corp.*,[38] among other authorities. The court went on to say that local law applied ". . . even though the Congress has embraced such cases within the maritime jurisdiction of the United States,"[39] by the Extension of Admiralty Jurisdiction Act.

The reliance by the Court of Appeals on *Gutierrez v. Waterman Steamship Corp.*,[40] is, we submit, misplaced. In *Gutierrez*, the work in progress (discharging a ship), was clearly maritime. In the case at bar, both the locale and the work in progress (constructing a tunnel under a canal) were clearly non-maritime.

It is submitted that petitioners' sole liability under the facts of this case is that prescribed by the Louisiana Workmen's Compensation Act.

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[36] 266 F.2d 82 (4 Cir. 1959).
[37] 328 U.S. 1.
[38] 259 U.S. 263.
[39] *American Export Lines v. Revel, supra,* at p. 84.
[40] 373 U.S. 206, *reh. den.* 374 U.S. 858.

Point II. Assuming the Applicability of the Longshoremen's Act, that Act is Respondent's Sole Remedy and Petitioners' Sole and Exclusive Liability.

The court below found that the Longshoremen's Act applied to the facts of this case, but failed to recognize that if that Act applied, the benefits thereunder provided respondent Perry's sole remedy against petitioners.

As shown above, respondent Perry was the employee of a subcontractor (Underwater) of petitioner Baltimore. The record shows that the subcontractor had failed to procure compensation insurance in accordance with the provisions of the Longshoremen's Act.[41]

Section 4 of the Longshoremen's Act[42] provides as follows:

> "(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.*" (Emphasis added.)

[41] R. 189, Cf. 202 So.2d 694 at 697-698.
[42] 33 U.S.C.A. §904.

Since the subcontractor failed to secure the payment of compensation, petitioners became liable under Section 4 for the payment of compensation to Perry.

Section 5 of the Longshoremen's Act provides in part as follows:[43]

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

In a situation such as the case at bar, where the contractor is made liable for compensation under Section 4 of the Act, he is granted the immunity from a tort action provided by Section 5. Although Sections 4 and 5 of the Longshoremen's Act have not been judicially construed in a situation where the subcontractor failed to secure the payment of insurance, Judge Holtzoff in *Thomas v. George Hyman Construction Co.*,[44] discussed this situation as follows:

> "The law does not accord to the general contractor the choice of either carrying workmen's

[43] 33 U.S.C.A. §905.

[44] 173 F.Supp. 381, 383 (D.C.D.C. 1959), *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5 Cir. 1967), at first reading would seem to be a case in point. A reading of the record of this case will disclose, however, that in *Probst* the subcontractor had procured the necessary compensation insurance so that the contractor was not liable for compensation under Section 4 of the Longshoremen's Act to the injured employee of the subcontractor.

compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance."

Where the contractor is made liable for the payment of compensation under Section 4, it is necessary that the contractor be granted immunity from a tort action to maintain the constitutionality of that section of the act. In *New York Central Railroad Company v. White*,[45] this Court established the criteria for upholding the constitutionality of the workmen's compensation scheme: The Workmen's Compensation Act deprives the employer or the contractor of some rights, makes them liable without fault, and takes away from them various defenses. Similarly, it takes away the right of the employee to recover damages for an injury sustained in the course of employment. The court stated, however, that the very basis of the constitutionality of the Act was that the employer or contractor and the employee received a *quid pro quo*.[46] To the same effect, see the comments of both the majority and minority in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*[47] If the contractor in this case is to be made liable for the payment of compensation, and thus liable without fault, he must have his *quid pro quo* of immunity from tort liability in order for Section 4 of the Longshoremen's Act to be

[45] 243 U.S. 188.
[46] *Ibid.*, at 203-204.
[47] 350 U.S. 124.

constitutional under the criteria established in *White* and *Ryan*.

Nor can the constitutionality of such a provision be upheld on the basis that the contractor in such a case would receive a credit for compensation paid against any tort recovery. For what of the situation where the contractor was not negligent but has paid compensation? Where then is the *quid pro quo?* And what of the case where the compensation liability is greater than the damages awarded in the compensation action?

In the vast majority of jurisdictions in which contractors are subjected to compensation liability to employees of subcontractors, the contractors are immune from tort liability.[48] Professor Larson properly criticizes the contrary ruling in the states of New York and Wisconsin as follows:[49]

> "The most extreme holding on this point is the Wisconsin and New York ruling that the general contractor remains liable to a common law suit even if he is also liable for compensation, his only comfort being that the amount of the compensation is deducted from the damages to prevent a double recovery. The theory of this extraordinary holding is that the general contractor does not in any sense become the 'employer'; he is rather an insurer of the subcontractor's compen-

[48] Larson, "The Law of Workmen's Compensation," Matthew Bender & Co., Inc., (1961 Ed.) Vol. 2, P. 175.
[49] *Ibid.*, at 176-177.

sation obligations. This looks like a case of preoccupation with labels at the expense of substance. The general contractor, like the immediate employer, is subjected to non-fault liability compensation, whether you call him a statutory employer or insurer or anything else; and he ought in return to get immunity from damage suits."

In order to overcome the exclusiveness of liability provisions of Section 5 of the Longshoremen's Act, the Court of Appeal construed *Jackson v. Lykes Bros. Steamship Co., Inc.*,[50] as emasculating the exclusivity provisions of Section 5 of the Longshoremen's Act. It is respectfully submitted that *Jackson* did no such thing.[51] While *Jackson* certainly did except from the provisions of Section 5 situations involving suits by longshoremen against their employers who were also shipowners, *Jackson* was seeking to maintain uniformity of rights for a particular class of workers, longshoremen. *Jackson* thus held that the rights of a longshoreman to maritime tort recovery should not be defeated simply because his employer also happened to own the ship. A contrary holding, the court felt, would give such longshoremen lesser rights than their fellow longshoremen whose employer did not own the ship on which they were working when injured. Certainly this court did not intend by its decision in *Jackson* to repeal Section 5 of the Longshoremen's Act.

[50] 386 U.S. 731.

[51] Cf. *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4 Cir. 1966) commenting on the effect of *Reed v. SS YAKA*, 373 U.S. 410, *Jackson's* predecessor, on Section 5 of the Longshoremen's Act.

The factual situation and the underlying policy considerations in *Jackson* and in the case at bar are essentially different. Maintenance of the exclusivity provisions of Section 5 in this case would affect all workers similarly situated and would not effect a disparity of the rights of any such workers. Clearly, maintenance of the exclusivity provisions in this case would deprive the injured party of a tort remedy against the general contractor (although in this instance he would have a tort action under Section 5 of the Longshoremen's Act against the subcontractor for its failure to secure compensation). But it would also constitutionally achieve the purposes of the Longshoremen's Act, i.e., to insure that an injured worker is compensated regardless of fault.

In conclusion, if the Longshoremen's Act is applicable, it is respondent Perry's only remedy against petitioners.

Point III. The Courts Below Erred in Failing to Grant Petitioners' Claim for Indemnity.

The Court of Appeal denied petitioners' indemnity claim on the grounds that there was no negligence of any of the employees of Underwater.[52] Assuming respondent Perry can recover in maritime tort, it is respectfully submitted that the court below erred first in not applying proper principles of maritime indemnity, and secondly in not finding that Underwater and Perry had breached their warranty of workmanlike service.

[52] Appendix C.

Petitioners' rights to indemnity are not founded upon tort or negligence standards as the court below erroneously thought, but are based on respondent's contractual warranty of workmanlike service, and are governed by general principles of maritime indemnity actions.[53]

The record shows that Perry had a line tender, Picou, to assist him in the diving operations. It was Picou's job to assist Perry in the diving by notifying him of any danger, by pulling Perry out of the water in the event that Perry notified him of any emergency, by making sure that Perry was not in an area of danger, and the like.[54] Picou was standing about 20 feet from the base of the crane which ultimately picked Perry up.[55] Picou was the only man who could know at the time of this accident exactly where Perry was.[56] Perry could not be seen while underwater.[57] It is Picou's testimony that he did not know that the crane was digging in the area where Perry was when he was scooped up.[58] In the first place, this is absolutely incredible since, as stated, he was 20 feet away from the base of the crane.[59] But even accepting his testimony as true, this would prove that he did not perform his work in a workmanlike

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[53] *Ryan Stevedoring Corp. v. Pan-Atlantic Steamship Corp., supra; Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315; *Alcoa SS Co. v. Chas. Ferran & Co.*, 383 F.2d 46 (5 Cir. 1967).

[54] R. 134.

[55] R. 160.

[56] *Ibid.*

[57] *Ibid.*

[58] R. 159-161, 164.

[59] Cf. footnote 55.

manner, because it was his duty to know where the crane was in order that he could notify the crane where Perry was,[60] and notify Perry where the crane was,[61] to avoid just such an accident as eventually occurred. It was thus manifest error for the court first to apply a negligence standard, and then to find that Picou's actions did not as a matter of law constitute a breach of the warranty of workmanlike service of Underwater. Proper application of this principle clearly would have resulted in petitioners' recovery of indemnity from Underwater Exploration Co., Inc.

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[60] R. 163.
[61] *Ibid.*

CONCLUSION.

In conclusion, it is respectfully submitted that this Honorable Court should direct a writ of certiorari to the First Circuit Court of Appeal, State of Louisiana, to review its decision in this matter which wrongfully applies the Longshoremen's and Harbor Workers' Compensation Act where the state compensation act should apply, which fails to enforce the exclusivity provisions of the Longshoremen's Act, if applicable, and in failing to apply the principles of maritime indemnity.

Respectfully submitted,

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CERTIFICATE.

I, G. Edward Merritt, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing application to respondents' counsel of record, Messrs. Norman & Norman, by mailing a copy thereof, postage prepaid, to them at their offices at New Orleans, Louisiana on this .... day of March, 1968.

G. EDWARD MERRITT